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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
	)	
	)	DOCKET FILE COPY ORIGINAL

COMMENTS

Falcon Holding Group, L.P. ("Falcon") hereby submits its comments in the above-captioned rulemaking. Falcon owns and operates small cable television systems and therefore has a vital interest in the outcome of this proceeding. Falcon's comments are limited to certain issues involving small cable operator rate relief which are discussed in paragraphs 80-94 of the Notice of Proposed Rulemaking ("Notice") in the captioned docket.

Preliminary Statement

In its *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266 and 93-215, FCC 95-196 (*"Sixth Report and Order"*), 10 FCC Rcd 7393 (1995), the Commission redefined the category of small systems to which it extends special rate and administrative relief. Under the revised definition, systems serving 15,000 or fewer subscribers that are owned by small cable companies having 400,000 or fewer subscribers may elect small system cost-of-service relief using a simplified procedure provided for in the *Sixth Report and Order*. In establishing this new regulatory scheme, the Commission

recognized that some systems in need of rate relief would be excluded by its numerical test and promised to entertain petitions for special relief from such systems.

In the 1996 Cable Act, Congress further enlarged the definition of small systems by deregulating rates for cable programming service tiers (and in certain cases, basic tier services) for small cable operators in any franchise area in which that operator serves 50,000 or fewer subscribers. A small cable operator was defined as an entity that, directly or through an affiliate, serves in the aggregate fewer than one percent of all cable subscribers nationwide and is unaffiliated with any entity whose gross annual revenues exceed $250 million. In the wake of the 1996 Cable Act, several huge mergers have charted a course that asks just how large must an operator be to survive in the industry.

Falcon is a conglomeration of small systems that is unique among the industry's MSOs. With an average of fewer than 3000 subscribers per system and fewer than 30 subscribers per mile of plant, all but a handful of Falcon's systems are below the levels set by the Commission for qualified small systems and well below the levels set by Congress. Falcon has been hindered from participating in any of the recent regulatory benefits provided to small systems by the Commission primarily because of questions regarding the affiliation of its various entities. Falcon therefore submits these comments to address the definition of affiliation for the purposes of small systems rate relief and

asks that the Commission clarify that definition so that Falcon and other qualified small cable operators can be afforded the relief which is necessary for their survival in the current marketplace.

I. MSO AFFILIATION IS A POOR SURROGATE FOR DETERMINING SMALL OPERATOR STATUS

The stated purpose of the definition of affiliate, as it is applied in the context of small systems, is to limit relief to entities that do not enjoy the financial resources of large companies. In establishing its definitions of small systems and small companies, the Commission correctly concluded that flexibility was needed in applying the definition of affiliate, stating: "If . . . [a] system fails to qualify for the small system definition because it is affiliated with a cable company that serves over 400,000 subscribers, we will consider the degree to which that affiliation exceeds our affiliation standards, and whether other attributes of the system warrant that it be treated as a small system notwithstanding the percentage ownership of the affiliate." *Sixth Report and Order*, at para. 36. The Commission then noted: "A small system will be considered affiliated with a cable company serving more than 400,000 subscribers if such a company holds more than a 20 percent equity interest (active or passive) in the system or exercises de jure control (such as though [sic] a general partnership or majority voting shareholder interest). Where a larger company is so affiliated with the small system, we believe the system will have access to the resources it needs to grow as well as larger systems, and hence

should not be in need of the relief we will accord to small systems that have no such access." *Sixth Report and Order*, at n.88. While this premise may be valid in many instances, the existence of de jure control, as so defined, should not definitively determine whether small system rate relief should be granted. Upon proper petition, the Commission should assess all the facts in order to determine whether the controlling relationship embodies a financial commitment that brings to bear the advantages which makes affiliation with a larger entity a disqualifying factor.

The availability of programming discounts through an "affiliate" is of dubious value since, under the current rate regulations, programming cost increases are passed through to subscribers and have no impact on cash flow. In terms of economies of scale, it should be determined if the MSO itself enjoys efficiencies that can surmount the problems faced by a small system including: local politics; local franchising authority requirements; the need to respond to competitive inroads; the need to upgrade plant, etc. It should not be an automatic assumption that de jure MSO control necessarily favorably impacts these concerns and therefore MSO affiliation should not be an insurmountable barrier to small system status. The most important question is whether the availability of capital or capital financing terms is enhanced by an "affiliate."

As an example, Falcon is the general partner and less than 5% owner of several systems which it operates. It may,

therefore, be argued that de jure control exists and Falcon's systems would not qualify for small system relief. However, these Falcon systems are so uniformly small as to make this conclusion oppressively unfair. All of Falcon's systems meet the Congressional definition under the 1996 Telecommunications Act of a small system in terms of size. Ninety-eight percent of Falcon's 315 headends meet the Commission's definition, serving fewer than 15,000 subscribers. Furthermore, 301 of Falcon's systems, or 95.6% of its systems, serve fewer than 10,000 subscribers. In today's competitive climate, it does not make sense to conclude that it is possible to gain a significant competitive advantage by conglomerating this many systems of this size. Even in the unregulated era in which the company was founded, Falcon's investors saw fit to require each entity to be financially self-sufficient. As a result, Falcon's systems do not enjoy financial benefits, in terms of lowered credit risk or other advantageous financing terms, or availability of capital, from their shared affiliation. In circumstances like Falcon's, therefore, such systems should be eligible for small system regulatory relief, particularly where the only control factor is de jure, not a 20% or greater ownership.

II. TRANSITION FROM SMALL SYSTEM STATUS

A transition mechanism is necessary to facilitate the growth of systems that initially qualify as small systems but at some later date exceed the established thresholds. In Falcon's case, if all of its eligible systems now enjoyed small system status, a

single future disqualifying event based on affiliation could potentially require the simultaneous conversion of all its systems to a different regulatory scheme. What is needed is a mechanism that phases in regulatory responsibilities and yet maintains incentives for growth and upgrading of systems. Accordingly, Falcon submits that, if a cable system met the statutory small operator test as of February 8, 1996, the system's CPST rates should remain deregulated regardless of subsequent events. At the very least, the rate charged by a deregulated small cable operator at the time that the operator first exceeds the statutory thresholds (e.g., upon the operator's acquisition by a larger company) should be grandfathered, with future increases governed by the price cap rules generally applicable to regulated systems.

The reasons for allowing small cable operators to retain their deregulated status are readily apparent. As the Commission has recognized, the 'small cable operator provisions of the 1996 Act . . . have the . . . intent of minimizing regulation and ensuring access to needed capital for smaller cable entities." Notice at para. 26. Such provisions should be viewed as an acceleration of the March 31, 1999 sunset of upper tier rate regulation provided for in Section 301(b)(1)(C) of the 1996 Act. Such an acceleration of upper tier rate deregulation for the benefit of small cable operators furthers the goal of loosening the regulatory constraints on such operators so they can devote

their resources to effectively serving their subscribers and to corporate growth initiatives.

CONCLUSION

The application of the affiliate definition should only raise a rebuttable presumption in assessing the regulatory status of a small system or a small cable operator. The true factors on which the Commission was focused when it promulgated the definitions included access to capital (including terms and conditions), regulated and/or gross revenues, and individual system size. These should not be obscured by a nebulous de jure control standard which does not accurately portray the true nature of a particular MSO. Falcon asks that any revised definition remain true to the relevant factors and remove or ameliorate the criterion of de jure control.

Respectfully submitted,

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